



August 8, 2001

Ms. Molly Cagle
Vinson & Elkins, L.L.P.
One American Center, Suite 2700
600 Congress Avenue
Austin, Texas 78701-3200

OR2001-3466

Dear Ms. Cagle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150485.

The Guadalupe-Blanco River Authority ("GBRA"), which you represent, received a request for several categories of information concerning GBRA's application to the Texas Natural Resource Conservation Commission ("TNRCC") to amend a certificate of adjudication.¹ You inform us that GBRA has released or is preparing to release some of the requested information to the requestor. Thus, with the exception of the information that you have submitted for our review, or that is represented by the submitted information, we assume that GBRA has released to the requestor all responsive information. See Gov't Code §§ 552.301, .302. You have submitted for our review representative samples of the types of information GBRA seeks to withhold, which you have marked as

¹The requestor seeks 1) GBRA's application to the TNRCC to amend GBRA's Certificate of Adjudication, Application 18-2074E, all documents, correspondence, e-mails, memoranda, audio or video recordings, reports, or other records from January 1, 1997 to the present, and 2) all agenda, minutes, recordings, or other records of any meeting of GBRA's Board at which the topic of Application 18-2074E was posted to be discussed or deliberated, including but not limited to any meeting of the Board at which the Board considered giving its permission for the Application 18-2074E to be submitted to TNRCC, any meeting of the Board at which the Board had any discussion or took any action concerning section 2(d) of the GBRA Act, and any meeting of the Board at which the Board had any discussion or took any action, including adopting a resolution or order, concerning "subordination" of GBRA's Certificates of Adjudication Nos. 18-5488 and 18-5172 for hydroelectric use on the Guadalupe River.

Exhibits 1 through 22.² You assert that this information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.106, 552.107(1), and 552.111 of the Government Code. We have considered the exceptions you assert and have reviewed the submitted information.

We note that information responsive to the request includes minutes or recordings of open meetings of GBRA's board. Under section 551.022 of the Government Code, "[t]he minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." Therefore, the GBRA must release such information. Because the submitted samples contain no such minutes or recordings from an open meeting, as noted above, we assume such information has been released. However, you assert the section 552.101³ exception for a sample certified agenda of a closed meeting. Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." Such information cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988). Accordingly, GBRA must not release any responsive certified agendas or tape recordings of closed meetings.⁴

Exhibit 19 contains copies of draft amendments to a settlement agreement relating to the contested case before TNRCC. You inform us that this information has been disclosed to the party in litigation with whom GBRA was proposing settlement. Section 552.007 of the Government Code provides:

(a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records that GBRA seeks to withhold. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

³Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

⁴You argue that highlighted, handwritten notes used to create the certified agenda, which you have redacted from the information you have released to the requestor in Exhibit 15B, are also confidential under section 551.104(c). Because we conclude, below, that this information may be withheld under section 552.103, we do not address this argument.

(b) Public information made available under Subsection (a) must be made available to any person.

You assert that this release of that information to an opponent in GBRA's litigation before the TNRCC is not subject to section 552.007(b), and cite Open Records Decision No. 579 (1990). However, that decision involved the exchange of information between litigants in "informal discovery, and guidelines set forth by the Texas Supreme Court and Court of Criminal Appeals. *Id.* at 7. Because you have failed to show that this was not a voluntary release, we conclude that the settlement agreement drafts, which we have marked, are subject to section 552.007(b), and therefore must be released to the requestor.

Section 552.103 excepts from disclosure information:

relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

[Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, GBRA must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). This office has determined that contested administrative proceedings under the Administrative Procedure Act, chapter 2001 of the Government Code, constitute litigation within the definition of that term under section 552.103. Open Records Decision No. 588 at 7 (1991). You inform us that a contested case involving GBRA and related to the information at issue has been pending since August of 1997 before the TNRCC. Such proceedings before the TNRCC are conducted pursuant to the Administrative Procedure Act. *See* Water Code § 5.103(c). Thus, the pending matter before TNRCC constitutes litigation for purposes of section

552.103 that was pending when GBRA received the present information request.⁵ In addition, you inform us that a related court case to which GBRA is a party, *In Re the Adjudication of Rights to Water in the Edwards Aquifer*, No. 89-0381 (22nd Dist. Ct., Hays County, Tex. Jan. 1, 1997), remains pending in that county after remand from the U.S. Court of Appeals for the Fifth Circuit. Thus, as to the first prong of the above-stated test, GBRA has demonstrated that litigation was pending at the time the GBRA received the present information request. As to the second prong of the above-stated test, upon careful review of the submitted information, we agree that the information relates to the two pending litigation matters. Except as otherwise noted herein, GBRA may therefore withhold the information represented by the submitted samples pursuant to section 552.103(a).

Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, GBRA must release to the requestor the documents we have marked in Exhibit 19 pursuant to section 552.007(b) of the Government Code. Any responsive certified agendas or tape recordings of closed meetings are confidential under section 551.104(c) and must not be released. To the extent the remaining information has not been made available to all parties in the two pending matters, it may be withheld under section 552.103(a).⁶

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must

⁵You also argue that GBRA reasonably anticipates litigation. As we find that any such anticipated litigation relates to the pending matter before TNRCC, we need not further address this argument.

⁶Since sections 552.101 and 552.103 are dispositive of the issues, we need not address the section 552.104, 552.106, 552.107(1), or 552.111 assertions with respect to the remaining information.

appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

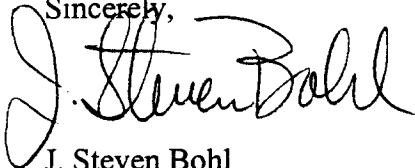
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Steven Bohl". The signature is fluid and cursive, with the first name "J." and last name "Bohl" clearly distinguishable.

J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 150485

Enc: Submitted documents

c: Mr. Bill Aleshire
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(w/o enclosures)